

Texas Auctioneers Association – Open Letter – Part 2 of 3

Date: May 1, 2015

To: Texas Auctioneers Association
201 Stillwater, Ste. 8
Wimberley, TX 78676

From: Charlie Dean, TAA member, Texas resident

Re: **Buyer's Premium Should Not Be Allowed.**

This is the second in a three-part series of an open letter to the Texas Auctioneers Association (TAA). Absent a law that specifically permits it, or some narrow circumstances, a buyer's premium (BP) should be prohibited. Certainly a BP and a seller's fee should not be used together. In the great majority of instances the **BP violates the Sherman Antitrust Act** (the Act). The BP is a surreptitious way of (1) making it appear that a burden has been shifted from seller to buyer, or (2) shifting the burden back and forth between the seller and buyer, or (3) raising the total money that the Auctioneer ends up with, or (4) adding confusion into the market system, or (5) squeezing on a competitor.

The BP is a form of predatory pricing per se, and especially so when collusion is involved. The BP occurs at only one spot in the commerce stream. The BP exploits a flaw in the system and allows one market participant to take advantage of others. The other participants, or victims, have no recourse. They cannot use a BP or any similar device against the Auctioneer. In the second-hand market of buying and selling used cars, furniture, antiques, collectibles, and other items, the BP favors those market participants who are upstream from the Auction house and burdens downstream participants.

Take the **charity auction**, an auction where the least harm could occur to the public. Even at a charity auction, where there is no other secondary vendor participating, the **violation of the Act occurs by befuddling the payment process**. There is simply no other reason for the BP at a charity auction. Ironically, the target or mark of this scheme is the charity that hires the Auctioneer and the bidder who wants to support the charity. It would be more transparent if the Auctioneer were to simply increase his client's fee and drop the BP. The use of the BP is behavior intended to deceive others.

Take the **used car auction**, a part of a narrow secondary market providing liquidity for the products that move through it. While one may argue that a BP is not illegal per se, any **collusion** to introduce it is. While this may not be an intended assault on car dealers, its affect is the same. The BP **transfers a hefty chunk of the dealer's profits to the auction house**, and has a ripple effect up-stream and down-stream.

Tacit collusion occurs where two or more Auctioneers agree to play a certain strategy without explicitly saying so. Thus, there may be unwritten rules of collusive behavior such as **price leadership**. Once a price leader emerges, it sets the general industry price with other Auctioneers following suit. If some Auctioneers charge a BP, others would feel justified (or compelled) to ratchet up their costs to the consumer.

There would be **little chance of losing market share** if everyone does it. This is especially so if the price changes are **not related to changes in operating costs**. Even if the price changes are obviously not related to changes in operating costs, **nobody can do much about it**. We encourage ourselves to use the BP. We know that when more of us use the BP it becomes less

likely that the public will have any recourse. An Auctioneer is not just a cog in a machine. If there is collusion, any Auctioneer who imposes a BP is an accomplice to the scheme, even if he might not have direct connection to any adversely affected person.

The BP makes it less profitable for a dealer to resale what he buys at the action house. Being *in a pinch*, the dealer must take a *bigger bite* out of his next customer who wants to consign an item or purchase an item. People who buy from the dealer must pay a higher price to offset the BP. Now the customer of the dealer is in the pinch, so he might find it to his benefit to consign his car to an auctioneer or to buy from an auction house, thus removing business from the dealer. The end-result is that the dealer makes less profit and can do nothing about it. By using the BP the Auctioneer reconfigures the system to favor himself, at the expense of the dealer. I realize that not all auction houses are public, but this does not eliminate the harm. **The BP is an anticompetitive practice.** Any collusion in setting commissions or fees constitutes an **illegal restraint of trade under the Act.** The market is affected up-stream and downstream as set out below.

- Used-Seller:** An individual who buys a new car and trades in his old car.
- Ford-Dealer:** A business that sells an individual a new Ford car and purchases his old car. This business consigns the old car to the Auction-House. The Ford-Dealer pays a percentage fee to the Auction-House.
- Auction-House:** A commission merchant business that sells a lot of used cars. The Auction-House charges a fee to the Ford-Dealer, as well as a BP to the Used-Dealer.
- Used-Dealer:** A commission merchant business that buys and sells used cars. This business buys from the Auction-House, as well as from some individuals who want the Used-Dealer to sell their cars. This business pays a BP to the Auction-House.
- Used-Buyer:** An individual who buys a used car from the Used-Dealer. Sometimes this individual consigns a car to the Used-Dealer.

The BP is relevant to the business relationships, up-stream and downstream from the Auction-House. The upstream participants (above the Auction-House) are favored by this arrangement, and downstream participants (below the Auction-House) are subsidizing the other participants. Look at it from another angle.

- Auction-House:** The house accepts cars on consignment for a seller's fee, and also charges a BP to the Used-Dealer. As a result of this scheme, the house receives more consignments from the Ford-Dealer, sells more to individuals, and receives more consignments from individuals. The house keeps a few morsels from the BP.
- Used-Dealer:** This dealer is hit with the BP which cuts into his profit. He must raise the fee that he charges consignors, or make less profit. And he must raise the price of cars that he sells to individuals, or make less profit. This dealer in effect subsidizes the Ford-Dealer and the Used-Seller.
- Used-Buyer:** This individual pays extra to have his car sold, and he pays extra to buy a car. This individual in effect subsidizes the Ford-Dealer and the Used-Seller.
- Ford-Dealer:** This dealer pays a diminished percentage fee to the Auction-House because of the BP (shifting burden from the seller to the buyer). This dealer makes more sales of new cars because he can favor the new car buyer with a higher trade-in on his used car. This dealer is more likely to consign cars to the Auctioneer because this Used-Dealer is paying a BP.
- Used-Seller:** This person is subsidized as a result of the BP, as the Ford-Dealer can pay him extra for this used car. This person is more likely to buy a new car as a result of the subsidy.

Some Auctioneers take the position that the hammer price is not affected by the BP. Accepting this argument (as I do not) supports the above scenario. **Individuals buying old cars are subsidizing individuals buying new cars.**

The BP has little, if anything, to do with supply and demand and a lot to do with exploiting a weakness in the system. TAA members (some from out-of-state) **openly collude to impose a BP**. It is **encouraged at auctioneer school and at TAA conventions**. CHAPTER 1802. AUCTIONEERS does not mention “buyer’s premium.” However, “buyer’s premium” is mentioned in the Auctioneer Administrative Rules. Texas imposes fines if the Auctioneer fails to properly announce and state the details of the BP. The “buyer’s premium” is listed in the glossary of the Study Guide For Auctioneer Examination. **This collusion is about as open and blatant as it can be**. Once a BP has been established as a business protocol, it is easier to raise the BP instead of the seller's commission due to misperceptions of how this affects the hammer price and confusion of the payment arrangement.

The same dilemma exists for any kind of commission merchant who must pay a BP. It matters not whether he sells used office equipment, furniture, or used widgets. **Any agreement that affects price violates the law**. It is not necessary that everyone participate in a conspiracy for the conspiracy to exist.

There is **no apparent cost difference** within the Auctioneer’s business to account for the BP. It is not a fee to use the “telephone booth.” The BP (an increase in price) does not seem to be supported by increased costs, such as catalogs, sandwiches, drinks, WiFi use, or any service that an individual buyer would receive that is beyond what other buyers receive.

As I review case law involving Auctioneers violating the Act, the BP is at the heart of violations. Even assuming that the BP does not violate the act, it is certainly a catalyst to shenanigans that are in violation of the Act. Using the BP seems akin to offering free margaritas to an alcoholic. **Any fee to a buyer that is not justified by an extra-ordinary cost to the auction house should not be allowed.**

Another point of departure for violating the Act is allowing any fee to be negotiable after it has been established (and perhaps published). If such departure of a fee from the norm were not allowed in the first place, some violations of the Act would not happen. But then, if the BP were not allowed, any fee negotiation would have no effect on the buyer. The same can be said about illegal rebates. All the shenanigans have the same expected effects, to take advantage of others. One must wonder whether the reason for the BP is to **achieve the likely effects**, the effects that a reasonable person could anticipate.

All of this applies to online actions as well. There is no need to shift a burden to the buyers, UNLESS there is some hidden agenda such as **befuddling the payment system or squeezing on competitors**.

It is not possible for any Auctioneer to honestly explain why he uses the BP, other than to admit that he is **surreptitiously vying for an advantage at the expense of someone else**. It is not possible for any Auctioneer to explain how the BP benefits the public or promotes any free market system in a fair way.

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